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No. 94-590

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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VERNONIA SCHOOL DISTRICT 473,
*Petitioner,*

v.

WAYNE ACTON and JUDY ACTON,
guardians ad litem for JAMES ACTON,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit**

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## BRIEF *AMICUS CURIAE* ON BEHALF OF THE CALIFORNIA INTERSCHOLASTIC FEDERATION IN SUPPORT OF PETITIONER

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ANDREW PATTERSON *
General Counsel
38-350 Zanzibar Drive
Palm Desert, California 92211
(619) 360-2117

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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**On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* ON BEHALF OF THE CALIFORNIA INTERSCHOLASTIC FEDERATION IN SUPPORT OF PETITIONER

This brief is filed with consent of both parties. Letters of consent are filed concurrently herewith with the Clerk of this court.

### INTEREST OF *AMICUS*

The California Interscholastic Federation is a legislatively authorized association of approximately twelve hundred high schools charged with the responsibility of enacting and enforcing rules relating to eligibility for, and participation in, interscholastic athletics in the State of California. Issues potentially arising from the question before the court impact the discretion of this amicus, and the local schools which make up its membership, as well as the discretion of similar organizations, and local schools, throughout the United States.

This amicus is a legislatively recognized association of approximately twelve hundred high schools in the state of California which has been charged with the responsibility of "enacting and enforcing rules relating to eligibility for, and participation in, interscholastic athletics"[1]. The purpose of this brief is to support the ability of school boards and educators to evaluate and administer

[1] The California Interscholastic Federation (CIF) functions pursuant to Sections 35179 and 33353 of the California Education Code. It's structure is that of a legislatively recognized association of schools in the state of California There are similar high school associations in all fifty states of the United States and each of these associations is a member of the National Federation of High School Activities Associations which is located in Kansas City, Mo. The CIF's history is not atypical of similar social developments in the United States.

The CIF was founded in Los Angeles County, in 1914, by high school principals from some Los Angeles communities for the purpose of establishing such basic rules as requiring that high school players be enrolled in high school, that they be of a certain age, etc. There was no legislative authorization and not a great deal of concern about such legalistic niceties as authorization to exist, etc. and yet the organization has flourished. Today, all of the approximately twelve hundred high schools in California belong to the CIF. It consists of ten Sections and approximately 125 to 150 leagues. The organization sounded in contract (each school agreeing not to play any school which did not follow the same rules) and it operated on an extra legal basis until 1980 when it came to the notice of the California Legislature that no legislative authorization had ever been given for local communities to structure high school athletics. The Legislature thereupon granted legislative approval for the local boards to do what they had been doing since 1914. According to Los Angeles County census records, in 1914, the population of Los Angeles County 790,000. At present, it is 9,237,500. The state's present population, according to the California Department of Finance census records, is 32,140,000.

It is submitted that the organization flourished as it has because it has—notwithstanding the absence of legislative authorization for most of its existence—adhered to the social contract or bargain that exists between schools and communities and between associations and athletics—that academics will be honored over athletics and that equity of competition will be sought and maintained.



conditions present in their own communities and to urge caution with respect to any analysis which might result in an inference or argument that participation in interscholastic athletics is a right as opposed to a discretionary activity. It is the task of school boards and high school educators to balance the emotional appeal of athletics with the necessity of academics. Any inference arising from the court's opinion that interscholastic athletic participation is a right, as opposed to an activity, is likely to lead to voluminous litigation, in the context of asserted constitutional rights, of matters which local school districts, and the associations to which they belong, have been managing for the better part of a century and which may be better handled at the schoolhouse than elsewhere. It is the hope of this amicus that the discretion of local educators in the area of interscholastic athletics will be confirmed in the court's opinion.

This brief will seek to demonstrate that an overbroad view of interscholastic athletic participation as a purported *right* will result in serious consequences in a number of areas which have been held to be, and should be, within the discretion of local boards and the athletic associations to which they belong. Areas of concern, among others, are the maintenance of competitive equity between competitors; the maintenance of an appropriate educational balance between athletics and academics; the maintenance of the integrity of the athletic system; maintaining efforts to control the effects of recruiting and school shopping for the purpose of athletics; limitations of semesters and of age with respect to interscholastic athletic eligibility which corresponds to encouraging students toward a steady and appropriate progress through the educational system and considerations of safety; the organization of athletics into leagues, divisions, etc.; the construction and enforcement of playing rules; the discipline of athletes and students and maintaining an appropriate athletic structure in order to provide appropriate enjoyment and school enthusiasm to the community as a whole.

A number of cases, cited later in this brief, have held that athletic participation is not a right and the court is asked, in the analysis of the case at bar, to affirm that principle.

## ARGUMENT

### I. COMPETITIVE EQUITY

Woven throughout the entire subject matter of athletics is the subject of competitive equity—i.e., the inherent bargain in athletic competition to compete fairly. It's presence has been recognized in the case of *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1, 26 CR2 834 (1994), which involved drug testing, as does this case.

The inherent bargain to compete fairly, however, extends further. It is intrinsic to the phrase: *Hey, pick on someone your own size!*—a phrase not found in the statutes but nevertheless a well known and accepted expression of fair play[2]. The phrase represents the communities' recognition that there should be a rough equality or equity between adversaries and that standard is expected to prevail in interscholastic athletics. If it is not present, or if it not believed to be present, the result is a disappreciation of the values of the activity and a resulting loss of respect for the integrity of the program.

It is an unavoidable consequence that when faith in the integrity of the program wanes, coaches and participants will begin to stretch the rules to the outer limits, or perhaps ignore them, in an effort to attain what they see as competitive equity. Thus, if weight limits are only sporadically enforced, the result is a stretching, or

[2] "I'll tell you what this case is about. I wrestled when I was in college. If I were wrestling tomorrow I'd want to know if my opponent had something more than Wheaties for breakfast. That's what this case is about!"

Comments of the Honorable Armand Arabian, Justice, California Supreme Court, during oral argument of the case of *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 26 CR2 834.



ignoring, of the rules on weight limits. Similarly, if illegal practices are believed to be occurring, competitors will begin illegal activities to remain competitive. Thus, integrity in the system—if reasonable controls are to be maintained—is essential. The cases cited in this brief—regardless of the point made in any particular case—stand as testimony to the emotionality with which athletic participation is approached by some young people and, in many cases, their parents and coaches. There are far more decisions analyzing the legal ramifications of being disqualified from an athletic team than there are with regard to flunking an algebra examination. There is a great deal of emotionality that goes into the desire to engage in athletic competition. To maintain the integrity of that competition, everyone must reasonably believe that everyone else is playing by the same rules.

Competitive Equity also includes structure. Competition, by definition, includes two or more and that implies structure. When the number of competitors grows to the hundreds structure is no longer implied. It is necessary. In all states of which this amicus is aware schools are divided up and arranged into leagues which, in turn, are arranged into divisions or some similar grouping by some name. Leagues are generally composed of eight schools although some leagues have a few more and some have a few less.[3]

Implicit within the concept of fair play is the conceptual bargain that the schools within a league should be com-

[3] Eight schools is generally considered the ideal number of schools for a league for a number of reasons. In football, for instance, an eight team league is able to play seven league games and three practice games for a ten game season. This *single round robin* approach is considered the best in terms of leaving time for playoffs and championships and still ending all activities before the Christmas vacation. Basketball, which is usually a *double round robin* approach, works about the same for the winter season as does baseball/softball for the spring season when it is necessary to end all athletic activities in time for the students to study for the final exams for the year.

petitive so that it is not possible for one school to dominate the others and thereby monopolize the league championship. The same is true of divisions: One league should not dominate a division. Thus, when it is agreed to enter into competition it is also, implicitly, agreed that structure will be designed—and adjusted as needed—to create a competitive atmosphere. As a consequence, as the population shifts and schools grow or diminish in size or athletic competitiveness, leagues are realigned and adjusted, on a periodic basis, to insure the continuation of competitive equity. There is no right to play particular schools; to compete against particular athletes or teams; to play in, and dominate, a particular league or division. Instead, there is the obligation to play fair and to play competitively and the activity of playing at all depends upon the fulfillment of that obligation.

Competitive equity has sometimes been expressed as the *American Way of Fair Play* and, in essence, that is just what it is. To play on a level field, by the same rules[4] and to take no unfair advantage. In order to escape the unavoidable consequences that occur when competitors believe that another has an advantage of some sort by engaging in activities believed to meet that advantage, the court is asked to be sensitive to the reality of competitive equity as it considers the case at bar.

[4] In 1839 the residents of Cooperstown, New York would play a summer game called town ball. The game involved hitting a ball with a bat which had been thrown at the batter by another player. The field of play was undefined and every ball hit was a fair ball. There were no defined areas to run within, or run to, and scoring was an argument; not a factual determination. A young man who observed the game one day was appalled by the lack of definition and fairness and so he sat down and authored some rules of structure and protocol for the game. He called it baseball. It became the 'national pastime'. His name was Abner Doubleday.

The story is aprocryphal. According to Ken Burns, the co producer of the Public Broadcasting's *Baseball*, Abner Doubleday was not at Cooperstown, when all of this supposedly occurred, but at West Point where he was learning the skills which would result in him serving as a General officer for the Union Army at the Battle of Gettysburg. However, it does not matter that the legend is false. It's endurance has nothing to do with Abner Doubleday's proximity to the game of baseball. Rather, its longevity is found in what it tells us about ourselves, about sports, about structure and about playing fair. It tells us that as fiercely independent as we may be, we must have rules and structure—a bargain between ourselves whereby we all impliedly consent to play by rules which level the playing field and bring equity to our exercise in civilized competition. It is our antidotal recognition of the truth that it is only when the rules have been set, and the bargain struck, that the game can be played.



## II. OVERWHELMINGLY, COURTS WHICH HAVE CONSIDERED THE QUESTION HAVE CONCLUDED THAT INTERSCHOLASTIC ATHLETIC PARTICIPATION IS NOT A RIGHT

It is recognized that the concept of interscholastic athletics when addressed as not being a right does not carry with it the conclusion that the activity does, or should, prevail over all other values enunciated by the Congress or the various Legislatures. It is recognized, and not contested, that interscholastic athletics is subject subordination when its rules clash with constitutional and statutory proscriptions such as racial discrimination, gender discrimination, etc. The fact that interscholastic athletics is subordinated to such proscriptions, however, does not lead, and should not lead, to the conclusion that athletics is, in and of itself, either a property right or liberty interest. This concept was best expressed in *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976) in which the court said:

> "Appellant cites numerous cases in support of the contention that high school athletic regulations must survive constitutional scrutiny. The cases are distinguished by the fact that, in the context of athletic regulations, clearly defined constitutional principles are at issue. *See Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir.), *Gilpin v. Kansas*

*State High School Activities Ass'n, Inc.*, 377 F.Supp. 1233 (D.Kan.), and *Reed v. Nebraska School Activities Ass'n*, 341 F.Supp. 258 (D.Neb.)—sexual discrimination; *Davis v. Meek*, 344 F.Supp.. 298 (N.D. Ohio)—invasion of marital privacy. *See also Howard University v. National Collegiate Athletic Ass'n*, 166 U.S.App.D.C. 260, 510 F.2d 213—alienage discrimination; *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir.)—racial discrimination. That is not the case here. Participation in interscholastic athletics is not a constitutionally protected civil right. *Oklahoma High School Athletic Ass'n v. Bray, supra; Mitchell v. Louisiana High School Athletic Ass'n*, 430 F.2d 1155 (5th Cir.) *The supervision and regulation of high school athletic programs remain within the discretion of appropriate state boards, and are not within federal cognizance under 42 U.S.C. § 1983 unless the regulations deny an athlete a constitutionally protected right or classify him or her on a suspect basis."* (Emphasis added.)

This amicus is also aware of contentions that athletics should be referred to as a privilege although the privilege-right distinction has arguably been abandoned. This does not affect the substance of the position taken herein, however. As the court stated in *Walsh v. Louisiana High School Athletic Assoc.*, 616 F2 152 (5th Cir.):

> "The plaintiffs correctly note that a constitutional challenge to the denial of a benefit cannot be answered merely by arguing that the benefit is a privilege rather than a right. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011; *Shapiro v. Thompson*, 394 U.S. 618. 89 S. Ct. 1322; *Sherbert v. Vrner*, 374 U.S. at 404-06, 83 S. Ct. at 1794-95. . . . However, the plaintiffs fail to note that, despite the abandonment of the right-privilege distinction, there remain some interests that are outside the scope of constitutional protection. The due process clause of the fourteenth amendment extends constitutional protection



> to those fundamental aspects of life, liberty, and property that rise to the level of a 'legitimate claim of entitlement' but does not protect lesser interests or 'mere expectations'. . . . A student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement. As decided in *Mitchel*, it falls 'outside the protection of due process'. . . ."

It is also recognized that *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, recognizes a student's entitlement to a public education as an interest which is constitutionally protected. As the court stated in *Aubach v. Odle, supra*, however,

> "(I)t is necessary to note that in framing the property interest the Court in *Goss* speaks in terms of the 'educational process.' 419 U.S. at 576, 95 S.Ct. at 737, 42 L.Ed. at 735. The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity and membership in school clubs and social groups, which combine to provide an atmosphere of intellectual and moral advancement. We do not read *Goss* to establish a property interest subject to constitutional protection in each of these separate components."

It is submitted that there is no constitutional right to recess.

In the context of the above, there are a substantial number of cases which have held that participation in interscholastic athletics is not a right.

In the case of *Adamek, et al. v. Pennsylvania Interscholastic Athletic Association*, 57 Pa. Cmwlth. 261, 426 A.2d 1206 the court held that students had no constitutionally protected property interest in participating in interscholastic high school sports, despite alleged possi-

bility of athletic scholarships, and thus the high school athletic association's ordering high school football team to forfeit three victories because of participation of scholastically ineligible player could not deprive students of due process rights.

The court described the issue as follows:

> "While this precise question is a novel one for this Court, no fewer than thirty jurisdictions have previously addressed this issue. The overwhelming majority of these jurisdictions have rejected the notion that participation in athletics is a property right." See also: *Walsh v. Louisiana High School Athletic Ass'n,* 616 F.2d 152, *reh. denied,* 621 F.2d 440 (5th Cir. 1980); *Hamilton v. Tennessee Secondary School Athletic Ass'n,* 552 F.2d 681 (6th Cir. 1976); *Albach v. Odle,* 531 F.2d 983 (10th Cir. 1976); *Parish v. NCAA,* 506 F.2d 1028 (5th Cir. 1975); *Mitchell v. Louisiana High School Athletic Ass'n,* 430 F.2d 1155 (5th Cir. 1970); *Oklahoma High School Athletic Ass'n v. Bray,* 321 F.2d 269 (10th Cir. 1963); *Kite v. Marshall,* 494 F.Supp. 227 (S.D.Tex.1980); *Ward v. Robinson,* 496 F.Supp. 1 (E.D.Tenn.1978); *Kulovitz v. Illinois High School Ass'n,* 462 F.Supp. 875 (N.D.Ill.1978); *Yellow Springs Exempted Village School Dist. v. Ohio High School Athletic Ass'n,* 443 F.Supp. 753 (S.D.Ohio 1978); *Colorado Seminary v. NCAA,* 417 F.Supp. 885 (D.Colo.1976), *aff'd,* 570 F.2d 320 (10th Cir. 1978); *Dallam v. Cumberland Valley School Dist.,* 391 F.Supp. 358 (M.D.Pa.1975); *Stock v. Texas Catholic Interscholastic League,* 364 F.Supp. 362 (N.D.Tex.1973); *Taylor v. Alabama High School Athletic Ass'n,* 336 F.Supp. 54 (M.D.Ala.1972); *Paschal v. Perdue,* 320 F.Supp. 1274 (S.D.Fla.1970); *Florida High School Activities Ass'n, Inc. v. Bradshaw,* 369 So.2d 398 (Fla.App.1979); *Smith v. Crim,* 240 Ga. 390, 240 S.E.2d 884 (1977); *Kriss v. Brown,* 390 N.E. 193 (Ind.App.1979); *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.,* 552 S.W.2d 685 (Ky.App.1977); *Sanders v. Louisiana High School Athletic Ass'n,* 242 So.2d 19 (La.App.1970); *NCAA v. Gillard,* 352 So.2d 1072 (Miss.1977); *State ex rel. Missouri State High School Activities Ass'n v. Schoenlaub,* 507 S.W.2d 354 (Mo.1974); *Bruce v. South Carolina High School League,* 258 S.C. 546, 189 S.E.2d 817 (1972); *Tennessee Secondary School Athletic Ass'n v. Cox,* 221 Tenn. 164, 425 S.W.2d 597 (1968); *Sullivan v. University Interscholastic League,* 599 S.W.2d 860 (Tex.Civ. App.1980); *Trofimuk v. PIAA,* 7 D. & C.3d 712 (C.P.Butler 1978).



The court in *Adamek* went on to say: "Moreover, injury from lost media exposure and lost opportunities for athletic scholarships are "too speculative to establish a property interest as defined in (*Roth*") *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (.) *Parish v. National Collegiate Athletic Ass'n,* 506 F.2d 1028 (1034 n. 17) (5th Cir. 1975). *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association, supra* note 1, at 758 n. 37." See also, *Steffes v. California Interscholastic Federation,* 176 Cal. App. 3d 739, 222 Cal. Rptr. 355, 29 Ed. Law Rep. 677.

## III. AN INFERENCE THAT INTERSCHOLASTIC ATHLETIC PARTICIPATION IS A RIGHT CAN PRODUCE DELETERIOUS EFFECTS UPON EDUCATIONAL MATTERS WHICH HAVE BEEN TRADITIONALLY ADMINISTERED BY LOCAL COMMUNITIES, STATES AND THEIR ASSOCIATIONS

Traditionally, for a century or so, a balance between interscholastic athletics and academics has been maintained through the utilization of certain procedures and rules. The court is requested to be sensitive to these matters and to, if possible, eschew any indication that such rules and procedures are subject to attack upon the inference that athletics are a right in and of themselves. Some of the matters in question are:

### A. Recruiting, School Shopping—Rules Relating to Transfer Between Schools

Transfer rules have been upheld in a number of jurisdictions as an appropriate means by which to control the recruiting and school shopping of athletes from one school to another. The rules address transfers without a corresponding change of residence by the students' parents or guardians. As was stated in *Williams v. Hamilton,* 497 F. Sup. 641 (1980).

> "Past history, and especially recent events, have shown the unconscionable actions to which some individuals will resort in order to insure themselves a superior athletic program. Illegal recruiting of promising young athletes is the gravameen of this recurring problem. Not only is the atmosphere of fair competition irreparable clouded, but many times the lives of the athletes themselves in that athletics becomes primary and academicism secondary under the overbearing scrutiny of those who would entice through illicit means. It is unarguable that any state has an interest in prohibiting such occurrences in its high schools. One means towards such a prohibition is to impede those who would be the innocent objects of illegality from being immediately profitable to the perpetrators."

The concern of this amicus is that any indication from this court that participation in interscholastic athletics is a right would lead to the assertion in the courts below that, as a right, it may be engaged in by a transfer student without consideration or qualification as to when the enrollment occurred, whether the parents or guardians accompanied the student, the presence of absence of hardship as a cause of the transfer, etc. Some other cases dealing with the transfer of students, and upholding the right of local communities and states to control same, are: *Albach v. Odle,* 531 F.2d 983 (10th Cir.1976), *Bruce v. South Carolina High School League,* 189 S.E. 2d 708, 258 S.C. 546 (1972), *Chabert v. Louisiana High School Athletic Association,* 312 So. 2d 344, 323 So. 2d 344 (1978), *Cooper v. Oregon School Activities Assoc. & Faherty v. Oregon School Activities Assoc.* (Consolidated), 52 Or. App. 425, 629 P.2d 386 (1979) (Challenge upon religious grounds based upon fact that transfer was from a religious school to a public school.), *Dallam v. Cumberland,* 391 F. Supp. 358, *Quimby v. School District No. 21,* 455 P.2d 1019, *Tennessee Secondary School Athletic Association v. Cox,* 425 S.W. 2d 597, 221, Tenn. 164. *Steffes v. California Interscholastic Federation,* 176 Cal. App. 3d 739, 222 Cal. Rptr. 355, 29 Ed. Law Rep. 677, *Walsh v. Louisiana High School Athletic Assoc.,* 616 F.2d 152 (5th Cir.); *Herbert v. Ventetuolo,* 480 A.2d 403 (R.I.); *Berschback v. Michigan High School Athletic Assoc.,* 397 N.W. 2d 234; *Simkins v. South Dakota High School Activities Assoc.,* 434 N.W. 2d 367.



### B. Emphasizing Safety and Educational Progress—Age and Semester Limitation Rules

Generally, most states have rules which provide that high school interscholastic athletics is not open to students who have attained their nineteenth birthday by a certain date. The rationale for such a rule involves safety implications created by competition between individuals whose age span is too great, the competitive equity aspects of permitting students who are too chronologically separated to compete against each other, or on opposing teams and, also, the consideration of inducing students to progress through their high school career within an appropriate span of time and to make room in the various programs for other students coming along. Such rules have been discussed in the cases of *Robinson v. Illinois High School Assoc.,* 45 Ill. App. 2d 277, 195 N.E. 2d 38; and *Missouri State High School Activities Association v. Schoenlaub,* 507 S.W. 2d 534. Should the court send a signal that interscholastic athletic participation is a right in itself the argument arising therefrom would be that age limitation rules designed to accomplish the goals set

forth above are questionable as against the right in question.

Semester limitation rules generally hold that a student is eligible for high school athletics for only eight consecutive semesters. The rationale, which is similar to the age limitations rules, is that students should be encouraged to progress through the high school years, and then on to college or a career, within an appropriate period of time and that the enjoyability, or other benefits to be obtained from continued high school athletics, may be withheld to accomplish this academic purpose. The rule also serves to open a finite number of team positions to younger students who are entering, or progressing through, their high school career. Some cases discussing the eight semester rule are: *Murray v. Florida High School Activities Assoc.*, 31 Fla. Supp. 66; *Mitchell, et al. v. Louisiana High School Athletic Assoc.*, 430 F.2d 1155; *Sullivan v. Florida High School Activities Assoc.*, 38 Fla. Supp. 18; *Smith v. Crim*, 240 S.E.2d 884 (Ga.); *Jones v. California Interscholastic Federation*, 197 CA3d 751, 243 CR 27; *Alabama High School Athletic Assoc. v. Medders*, 456 S.2d 284.

### C. Matters of Discipline

Cases dealing with discipline in the area of interscholastic athletes are: *Palmer v. Merluzzi*, 868 F.2d 90, 51 Ed. Law Rep. 1196; *Davenport v. Randolph County Board of Education*, 730 F.2d 1395 (11th Cir.); *Bush v. Dassel—Cakato Board of Education*, 745 F.Supp. 562. Clearly the ability utilize interscholastic athletic participation as a disciplinary tool is essential to educators in a number of ways and to hold that interscholastic athletic participation is a *right* would impose a severe hinderance upon the ability of educators to maintain good order and discipline in the educational environment. Values would be turned upside down and, in the normal course of school administration—in the trenches as it were—the



right to participate in athletics would begin to prevail over the ability of educators to control the wayward.[5]

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[5] There are some unusual spinoffs that sometimes occur with respect to discipline and athletics when athletics are confused to be a right. There is a county in California known as Plumas County. It is a rural county near the California Nevada border. It is a one judge county. There occurred an incident this past autumn wherein a young man was observed by the vice principal of the Plumas High School to be engaged in a physical altercation with another young man in the proximity of the vice principal's office. The vice principal, having witnessed what had occurred, placed the young man on a three day suspension. Objection was taken to this decision because the three day suspension would encompass Friday and that is the night that the football team plays its game. The vice principal refused to modify his decision and an appeal was taken to the principal and, also, to the deputy superintendent of the district, all of whom refused to overrule the vice principal. Suit was filed a few hours before game time (4:00 PM to 6:00 PM) and the principal of the high school was notified that the county judge would be reviewing the matter vis a vis a petition for a temporary restraining order. It was too late to contact the school district's lawyer and have him attend. Since the principal believed that he had responsibilities with regard to running the school—teams, crowds, support personnel arriving for the game, facilities being prepared, etc.—he opted not to attend the judge's review. The judge issued a temporary restraining order which permitted the student to play in that game and the student, who arrived at the game with court papers in hand, did play. Students laughed, football fans cheered, the educators were mortified and the community was irate. The case became the cause celebre of the locale and the question of the day became: Who's running the schoolhouse? The school district, with the same inquiry in mind, decided to press on and instructed its' lawyer to file a motion to dissolve the restraining order whereupon the county judge, who issued the restraining order, decided to recuse himself. A judge was brought in from another county who, after reviewing the matter, granted the district's motion. The lesson? Justice is not necessarily at the courthouse when it comes to disciplining wayward students. She is sometimes found in the vice principal's office. The case is *Warren John Mitchell v. Plumas Unified School District*, Plumas County (California) Superior Court Case #17496.

## IV. EDUCATIONAL BALANCE

Clearly, as was stated in *Williams v. Hamilton, supra,* the local communities, states, and their associations, have a strong interest in preserving the supremacy of academics over athletics. It is not the role of schools to produce athletes. It is undisputed that education prepares students for an active involvement in community affairs and matters of a civilized society. Without academics the citizenry would lack the knowledge, self-confidence and critical skills to evaluate the comments of the day from journalists and political leaders. Moreover, "(T)he person who reads Homer, Shakespeare, Byron, Joyce, and Yeats, studies music, and the universe, may never achieve economic, social or political advantage, or contribute tangibly to society. But his cultural attainments will produce (the) inner rewards . . . . As Justice Story wrote: 'It is one of the wise dispensations of Providence that knowledge should not only confer powers, but should also confer happiness (Story, Miscellaneous Writings 124)' ". Concurring opinion, Mosk, J., *Hartzell v. Connel,* 35 C.3d 899, 201 CR 601.[6] If academics—and the benefits of education—are going to prevail over the emotional enticements of athletics, however, it is necessary that communities, school boards and educators be provided with the tools to insure

[6] *Hartzell v. Connell,* which prohibited student fees for participation in extra curricular activities was distinguished in *Steffes v. California Interscholastic Federation,* 176 Cal. App. 3d. 739, 222 Cal. Rptr. 355, 29 Ed. Law Rep. 677. *Steffes,* which held there is no right to participate in high school athletics, was cited in 1994, by California Chief Justice Lucas, in *Hill v. National Collegiate Athletic Association* (1994) 7 C. 4th 1, 26 CR2 834, 865 P2 633, 88 Ed. Law. Rep. 327 (at 7 C4 43) when holding that there is no *right* to participate in intercollegiate athletic competition in California. Steffes also held that interscholastic athletic participation is not a right in California notwithstanding the holding in *Serrano v. Priest, supra,* 18 Cal.3d at pp. 765-766, 135 Cal.Rptr. 345, 557 P.2d 929; *Serrano v. Priest* (1971) 5 Cal.3d 584, 608-609, 96 Cal. Rptr. 601, 487 P.2d 1241 that education, itself, is a fundamental right under the California Constitution.



academic predominance at the school house is not impaired. It is a question of balance and it is respectfully submitted that the educators on the scene are in the best position to determine where the fulcrum will be placed and that discretion should be upheld. As stated by Justice Arabian in *Steffes v. California Interscholastic Federation, supra*:

> "The rules, regulations and procedures discussed herein, as they relate to the interscholastic athletic transfer rule, are prophylactic in nature, reasonable in scope and rationally based. As such, they neither trammel upon fundamental rights nor occasion unnecessary burdens.
>
> Curtailment or reduction of the abuses and transgressions which threaten to undermine student athletics are salutary goals which preserve equity between schools and protect the integrity of extracurricular programs."

*Steffes, supra* at p. 752.

## V. PLAYING AS A LITIGATABLE RIGHT

Should an inference be made that interscholastic athletic participation is a *right* the question which next arises is the extent of that *right* and the litigious burdens attendant thereto. It is a matter of common sense that many athletes believe, rightly or wrongly, that they are the best suited at any given moment, or in any given situation, to execute the tasks needed to prevail in the contest. It may also be believed by many, as a corollary, that it is unfair that some other player has been selected to enter the game or to occupy a position. Similarly, promotions to, and reductions from, first string, or from one position to another, are not generally greeted with universal enthusiasm by those who are being moved further from the action of the contest. Finally, secondary motives—to be noticed in order to advance the thought of an athletic career—enter into the equation since dreams of glory are more prevalent in the athletic department than in the

physics department. Litigation touching upon such matters has occurred and is found in the cases. It may seem that a remote familiarity with the world of athletics—where *Smith in for Jones* is a part of the art of the drama itself—would lead quickly to the conclusion that the act of *playing* is not a right but an activity subject to the discretion of coaches and others involved in the production and presentation of the sport and that an asserted litigatable right for *game time*, or *position on a particular string*, would be unlikely. Unlikely, perhaps, but not unknown. These points have been asserted and disposed of on the rationale that there is no property right, or liberty interest, in athletic participation. See *Colorado Seminary (University of Denver) v. NCAA*, 570 F.2d 320 (10th Cir.); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir.), and *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd on other ground, sub nom. Kush v. Rutledge*, 103 S. Ct. 1483 (1983). Should the view that there is no right to athletic participation change, by inference or otherwise, the tendencies toward litigation would be exacerbated and result in disappointed athletes attempting to replace the value judgment of the coach or administrator with the value judgment of the local judge.

Athletics operates on a timetable—one game follows another. Playoffs follow seasons and championships follow playoffs. In the context of athletic activity and administration choices must be made and athletic undertakings are simply not designed for the antiseptic adjudication of conflicts of opinions at the courthouse. For instance, playoffs are bracketed and teams are inserted into those brackets at the end of a given season. Teams play through the brackets, over a period of three to five weeks, or so, until a champion emerges. It is important, at the scholastic level, that the championship be determined, and the season ended by a date certain, since there are final examinations for which to prepare, a new semester on the horizon and a new group of different



activities coming on as the school year moves forward. As rule infractions are determined to have occurred, and consequences meted out, disappointments inevitably occur and to the extent the courthouse comes to be seen as a potential escape from those consequences, the more the protcols, structure and administration designed to serve the entire community are in danger of collapse due to overload. For instance, assuming a determination that a player is ineligible, how much time should—or can—be devoted to the adjudication of whether that determination is correct or fair? Should the playoffs be delayed until the decision is made? One game in the playoffs can't be delayed since such an event would be tantamount to delaying all other teams who must wait for that particular bracket to be determined. Should the athlete be played on the theory that it can all be worked out later? Suppose that athlete make a touchdown, the game winning basket or a ninth inning home run and is later determined to have been ineligible? Other teams will cry foul on the theory that the team in question had the advantage of an ineligible player and they didn't. The integrity of the system is compromised; access to the courts to gain the advantage of an ineligible player encouraged; certainty of results endangered; schedules, which impact a myriad of other educational activities, placed at risk—and all of this because of an analytic conversion of what has been traditionally viewed as a privilege to something called a *right*.

### A. Playing as a Right Would be a License Without Limit

Ineligible players are used. Rule infractions occur. Consequences follow and are frequently imposed upon the team as a whole—i.e., disqualification from post season competition, etc. As a result, players not involved with the rule infraction will not play in the playoffs or other post season events. Several issues arise: (1) Does each player have a *right* to play and, therefore, a right of

appeal? (2) Is each player entitled to a hearing based upon his or her personal *right* to play? (3) How much energy is to be devoted to the litigation of such *multiple rights* residing in a number of people? (4) Particularly, how are such hearings and litigation to be accomplished when the facts arise late (as they frequently do) and playoffs are about to commence? (5) What consideration is to be given to potential playoff opponents during these multiple hearings? Other teams, in other brackets, are able to prepare for a single known opponent while the opponents in question must prepare for two possible opponents until the controversy is resolved. Does this impinge upon their *right* to fair play? It has been held that notice at the school—not each team member or parents—is a sufficient notification and that each individual is not entitled to personal notice. The rationale of these cases is that there is no property right or liberty interest in athletic participation. *See Kelly v. Metropolitan Co. Board of Education of Nashville*, 393 F. Supp. 485 (Tenn.); *Hennessey v. NCAA*, 564 F.2 1136, *Moreland v. Western Penn. Interscholastic Athletic League*, 572 F.2 121 (2d. Cir.) and *Justice v. NCAA*, 577 F. Supp. 356 (Ariz.). Should the inference begin to arise that athletics is a *right* the assertion of that *right* will be limitless. It will extend outward to multiple players, parents, fans and the controversies, in the context of attempting to administer these matters as part of a school program, will have no end.

Does the judiciary want to involve itself into the thicket of athletic controversy where screaming at the umpire, and arguing endlessly about what might have been except for some call or other misfortune, is itself another aspect of America's way of playing the game?



## CONCLUSION

It is not arguable that athletics provide more emotional gratification than academics—particularly for the young. Although there are no studies, it may be reasonably posited that more hours are devoted, during the fall, in any single week, to watching football than to doing, or assisting in, homework. There are no *fight songs* for algebra, no lighted fields for history, no blaring bands for chemistry, no cheerleaders for biology. High school students who perceive an exciting heroism in the physics lab are decidedly in the minority.

Exciting or not, however, it is to the nation's school boards and educators that the task falls of instilling academics—and the arts—in young minds that may be dreaming other dreams. To achieve any degree of success in this endeavor it is necessary that structure and balance be maintained. Enticing students to appreciate the structure of a well expressed algebraic equation or a well stated turn of a phrase in English Literature will never be as easy as enticing them to the Friday night football game. Nevertheless, however, educators must strive to accomplish a youthful appreciation of the academics and, in that task, formulate a structure that will enhance at least some bit of success.

It is the duty of any lawful people, in any civilized society, to submit to the laws and the courts that interpret them. We do so submit. In that submission, however, we urge that wisdom encourages recognition of the consequences that may be imposed on communities, school boards and educators as a result of decisional inferences of athletic participatory rights. We urge a consideration for the people who must deal with those consequences. Education is more than athletics. It is academics, it is the arts, it is a *balanced* mixture of diverse disciplines and activities which deserves respect as a path toward a life well led.

It is in quest of that respect that this brief is submitted.

Respectfully submitted,

ANDREW PATTERSON *
General Counsel
38-350 Zanzibar Drive
Palm Desert, California 92211
(619) 360-2117

* Counsel of Record